Supreme Court, U.S.
FILED
APR 14 1995

No. 94-1514

In The

Supreme Court of the United States

October Term, 1994

GEORGE GILMORE MARTIN and
JULIA S. MARTIN,

Petitioners,

vs.

BANK OF FLOYD, a Virginia banking corporation; GENTRY, LOCKE, RAKES & MOORE, a partnership; WILLIAM R. RAKES, individually, WILLIAM J. CREECH, JR., individually; G. HARRIS WARNER, JR., individually; and RONALD LEON MOORE, individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS BANK OF FLOYD AND RONALD LEON MOORE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Virginia Respondents subjected themselves to the jurisdiction of the Georgia District Court by mailing two form letters requesting an updated financial statement and a notice of foreclosure letter to the Petitioners in Georgia?

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Come now Respondents Bank of Floyd and Ronald Leon Moore in the above-captioned matter and present this their Response to the Petition for Writ of Certiorari and show reasons why the writ should be denied.

STATEMENT OF THE CASE

On May 5, 1993, the Petitioners George Gilmore Martin and Julia S. Martin filed the present action in the United States District Court for the Northern District of Georgia ("the District Court") against Respondents Bank of Floyd (hereinafter "the Bank")[1], Ronald Leon Moore (hereinafter "Mr. Moore"), and others. The Petitioners have set forth four counts against some or all of the Respondents. These include claims for Federal RICO, Georgia RICO, breach of fiduciary duty, and conspiracy to breach fidicuary duties.

On March 1, 1994, the District Court granted the Bank's and Mr. Moore's Motion to Dismiss for lack of personal jurisdiction. That decision was unanimously affirmed by a three-judge panel of the United States Court of Appeals for the Eleventh Circuit. The Petitioners' Petition for Rehearing was denied.

The Petitioners' Statement of the Case fails to state the true facts of the case and is replete with misleading statements and inaccuracies. Instead of involving "fraudulent schemes," "intrinsically deceptive" letters, and a conspiracy to deprive the Petitioners of their property and money, this case concerns a simple, lawful foreclosure of real property located in Virginia.

The Bank is a Virginia corporation whose principal office is located in Floyd, Virginia. The Bank does not have an office or branch in the State of Georgia and does

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[1] Pursuant to Supreme Court Rule 29.1, and as noted in the Petitioners' List of All Parties, the Bank has no parent corporation and no non-wholly owned subsidiaries.

not advertise in the State of Georgia. It does not own, use or possess any real property in the State of Georgia, and does not hold a security interest on any real property located in the State of Georgia. There is no evidence that the Bank has any customers that reside in the State of Georgia. The Bank does not regularly engage in business in Georgia, solicit business in Georgia, or derive substantial revenue from goods used or consumed or services rendered in Georgia.

Mr. Moore, a Senior Executive Vice President and Chief Executive Officer of the Bank, is a resident of Floyd, Virginia. Mr. Moore does not own, use, or possess any real property in the State of Georgia. Mr. Moore does not regularly engage in or solicit business in the State of Georgia, and does not derive any revenue from goods used or consumed or services rendered in the State of Georgia.

The Petitioners resided in the State of Virginia until February, 1991. The Petitioners allege they are in the business of buying, subdividing, and selling real estate.

On or about May 15, 1990, the Petitioners executed a $630,000 Promissory Note to the Bank in Floyd, Virginia. To secure this loan, the Petitioners executed a Deed of Trust in favor of the Bank on the same date. The Deed of Trust transferred to Bruce W. Thompson and Dale Profitt, as Trustees, certain real property of the Petitioners located in Salem, Roanoke County, Virginia ("the Property") to secure the Promissory Note. Both the Promissory Note and the Deed of Trust were executed in the State of Virginia while the Petitioners were residents of the State of Virginia.

On or about August 21, 1991, and again on October 10, 1991, Mr. Moore, then Senior Executive Vice President and Chief Executive Officer of the Bank, sent to the Petitioners a standard form letter asking them to furnish an "up to date financial statement" as required by the terms of the Promissory Note and because federal regulations require FDIC-insured banks to have on file current financial statements for all borrowers. On or about September 16, 1991, the Bank executed a document entitled "Resignation of Trustee and Appointment of Substitute Trustee" removing Bruce W. Thompson as Trustee of the Property and replacing him with Respondent William J. Creech, Jr., a lawyer with the Respondent law firm of Gentry, Locke, Rakes & Moore ("the Law Firm").

Shortly therafter, the Petitioners defaulted on the Note and the Bank accelerated the indebtedness pursuant to the terms of the Note and declared the entire amount due and payable. On or about November 19, 1991, the Law Firm, on behalf of the Bank, sent a certified letter to the Petitioners advising them that their Note was in default and had been accelerated. The Petitioners were further advised that the Bank intended to institute foreclosure proceedings pursuant to the Deed of Trust. The Law Firm sent the letter to the Petitioners at their address at 6210 Aberdeen Drive, N.E., Atlanta, Georgia 30328 and at their address at 5596 Mitchell Road, No. 24, Atlanta, Georgia 30328. The Petitioners acknowledge receiving the letter and executing the return receipt on the letter, as is required for a valid foreclosure under Virginia law.

The Bank then advertised the Property for sale as follows:

> This sale is subject to filed and unfiled mechanics' liens, if any. This sale is further subject to any defects or exceptions to title arising prior to recordation of the Deed of Trust referenced herein.

The advertisements for the sale were published in the morning edition of the *Roanoke Times & World News* on Tuesday, November 26, 1991 and Tuesday, December 3, 1991 in Roanoke County, Virginia. The sale was scheduled for December 4, 1991. The Bank purchased the Property, with the exception of one lot, at the foreclosure sale.

In January, 1992, the Bank directed the Law Firm to sue the Petitioners for a deficiency judgment in Roanoke County Circuit Court, Roanoke County, Virginia. Mr. Moore executed an affidavit attesting to the deficiency. The Petitioners retained William Quillian, an attorney in Virginia, to represent them in connection with the action for the deficiency judgment.

Subsequently, the Bank began selling off lots from the Property which it then owned pursuant to the lawful foreclosure. All of these sales took place in Virginia. The Bank's and Mr. Moore's only contacts with the State of Georgia were mailing two form letters requesting an "up to date financial statement" and the November 19, 1991 notice of foreclosure letter to the Petitioners in Georgia.

SUMMARY OF ARGUMENT

The District Court and the Eleventh Circuit correctly ruled that the Bank and Mr. Moore are not subject to personal jurisdiction in Georgia. First, neither the Bank

nor Mr. Moore have any contacts with the State of Georgia. As such, maintenance of this suit against them in Georgia would offend "traditional notions of fair play and substantial justice." *Cable Home Communications v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990). Neither Mr. Moore nor the Bank transact any business affairs in the State of Georgia. The Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, does not solicit or regularly engage in business in Georgia, and has no customers in Georgia. Mr. Moore does not solicit or regularly engage in business in Georgia, or derive revenue from Georgia. All activities allegedly committed by the Bank and Mr. Moore were committed in the State of Virginia, and all actions remotely related to this case occurred in Virginia.

Furthermore, the District Court could not exercise jurisdiction over the Bank or Mr. Moore under Georgia's long-arm statute. *See* O.C.G.A. § 9-10-91. Neither the Bank nor Mr. Moore own, use, or possess real property in the State of Georgia, or transact any business in the State of Georgia. Furthermore, the evidence is abundantly clear that neither the Bank nor Mr. Moore committed any tortious acts in the State of Georgia. Accordingly, the District Court did not have personal jurisdiction over the Bank or Mr. Moore.

REASONS FOR DENYING THE WRIT

The question presented in the instant Petition is not novel. The Supreme Court has on several occasions clearly articulated the "minimum contacts" test for a

state's exercise of personal jurisdiction over a non-resident, and it is well-established that merely mailing three form letters into the forum state is wholly insufficient to satisfy that test. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Furthermore, there are no conflicting decisions from any federal appellate court or from the Georgia Supreme Court on this issue. Accordingly, the instant Petition satisfies none of the Supreme Court Rule 10.1 factors, and the Petition should be denied.

A federal court may only exercise personal jurisdiction over a nonresident defendent if the nonresident is amenable to service of process under the foreign state's long-arm statute or under a federal statute containing a service of process provision, *and* if "sufficient 'minimum contacts' exist to satisfy the Due Process Clause of the Fourteenth Amendment so that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice'." *Cable Home Communications v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir. 1990) (quoting *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), federal question case). *See also Brink's Mat. Ltd. v. Diamond*, 906 F.2d 1519, 1521 (11th Cir. 1990) (federal question and diversity of citizenship); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 1813 (1990) (federal question case); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526, 1529-30 (N.D. Ga. 1989) (diversity of citizenship case). A plaintiff bears the burden of establishing that personal jurisdiction exists over the nonresident defendant. *Stephens v. Coleman*, 712 F. Supp. 1571, 1574 (N.D. Ga.), *aff'd.*, 901 F.2d 1571 (11th Cir. 1989), *cert. denied*, 498 U.S. 998 (1990).

I. Neither Mr. Moore Nor The Bank Have Sufficient Minimum Contacts With The State Of Georgia.

The District Court and the Eleventh Circuit correctly found that neither Mr. Moore nor the Bank have sufficient "minimum contacts" with the State of Georgia to justify the exercise of personal jurisdiction over them. "The basic inquiry in a personal jurisdiction case . . . is whether the defendant has such minimum contacts with the forum so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Elec. Transaction Network v. Katz*, 734 F. Supp. 492, 499 (N.D. Ga. 1989). *See International Shoe Co., supra* at 310; *Evans, supra* at 1530. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations'." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

In *Burger King Corp.*, the Supreme Court set forth a two-pronged test to determine whether a court has personal jurisdiction over a non-resident: whether the defendant "purposefully established minimum contacts within the forum state," and, if so, "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'." *Id.* at 476. In determining whether minimum contacts exist, two factors are considered: foreseeability and purposeful availment. *Id.* The Eleventh Circuit Court of Appeals has stated:

> The foreseeability that is critical to due process analysis is that the defendant's conduct in connection with the forum state is such that he would reasonably anticipate being haled into court there. . . . The purposeful availment

> requirement seeks to ensure that a non-resident defendant 'will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts'. There must be some act by which he purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

Elec. Transaction Network, supra, at 499 (citations omitted). *Accord Evans, supra,* at 1531.

The Supreme Court has stated that a defendant has ample warning that he may be subject to a state court's jurisdiction if he intentionally directs his conduct and activities at a state's residents and "the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp., supra,* at 472. *See also DeLong Equip. Co., supra,* at 843 (some purposeful availment on the part of the defendant non-resident required before minimum contacts exist). Although the non-resident defendant's physical presence is not required in the forum state, the plaintiff's cause of action must "arise out of, or result from, the activity or activities of the defendant within the forum." *Shellenberger v. Tanner,* 138 Ga. App. 399, 404, 227 S.E.2d 266 (1976).

If sufficient minimum contacts exist, the court must address the second prong of *Burger King Corp., supra,* and review "reasonableness" factors to determine if the exercise of personal jurisdiction comports with fair play and substantial justice. *Elec. Transaction Network, supra,* at 499. "These factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining efficient and effective

relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies." *Id.*

It is abundantly clear that neither Mr. Moore nor the Bank has sufficient contacts with the State of Georgia to justify the exercise of personal jurisdiction over them by a federal court sitting in Georgia. Neither owns property in Georgia. Mr. Moore does not regularly engage in business in Georgia, derives no revenue from Georgia, and does not have an agent in Georgia. He has done nothing in Georgia such that he could reasonably anticipate being haled into court in Georgia. Clearly, the Petitioners' claims against Mr. Moore do not arise out of any activity of Mr. Moore in Georgia.

Likewise, the Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, and has no agent in Georgia. The Bank has few, if any, customers in Georgia. It does not engage in business in Georgia, and derives little, if any, revenue from Georgia. It has done nothing in Georgia such that it would reasonably anticipate being haled into court in Georgia, and the Petitioners' claims against it do not arise out of any activity of the Bank in Georgia.

Furthermore, the State of Georgia has little interest in adjudicating the Petitioners' "dispute" with Mr. Moore and the Bank. The Deed of Trust and Promissory Note were executed in Virginia. The foreclosure action and sale took place in Virginia. The foreclosed Property is located in Virginia. The suit for a deficiency judgment was filed and pursued in a Virginia court. The two form letters

requesting financial information and the foreclosure notice letter were mailed by Respondents residing in and working in Virginia. Furthermore, the alleged breach of fidicuary duties by Mr. Creech and the Bank took place in the State of Virginia. The burden of all Respondents coming to Georgia to defend this litigation is great, as well. Accordingly, no "minimum contacts" are present and the exercise of personal jurisdiction over Mr. Moore and the Bank would violate traditional notions of fair play and substantial justice.

II. The Bank and Mr. Moore Are Not Amenable To Service Of Process Under Georgia's Long-Arm Statute Or Any Federal Statute Containing A Service Of Process Provision.

Even assuming Mr. Moore and the Bank have sufficient contacts with the State of Georgia such that the exercise of personal jurisdiction would not violate their due process rights, the District Court could not exercise jurisdiction over them under Georgia's long-arm statute or under Federal RICO's service of process provision. The Federal RICO service of process provision authorizes service of process on RICO defendants "residing in any other district" if "the ends of justice" require it. 18 U.S.C. § 1965(b). This nationwide service of process provision has severe limits, however. In order to invoke § 1965(b), it must be shown that the court has personal jurisdiction over at least one of the RICO defendants, and the plaintiff must demonstrate that "there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's Local Union No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 539 (9th Cir. 1986).

"[M]erely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b) nationwide service provisions." *Id. See also LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826 (N.D. Cal. 1992) (California court refuses to invoke 18 U.S.C. § 1965(b) because all defendants were subject to jurisdiction in Kentucky and none in California). Neither of these requirements are met in this case.

Like the Bank and Mr. Moore, none of the other Respondents have constitutionally sufficient contacts with Georgia. Respondents Creech, Rake, and Warner are all attorneys with Respondent the Law Firm, which is located in Roanoke, Virginia. None of these Respondents has an office or place of business in Georgia. None practices law in Georgia, or is licensed to practice law in Georgia. The Law Firm has no employees who reside in Georgia, has no agents in Georgia, does not regularly transact business in Georgia, and is not licensed to transact business in Georgia.

Furthermore, the Petitioners could have brought this action in Virginia, where all of the Respondents are subject to personal jurisdiction. Accordingly, the Petitioners are prohibited from using the Federal RICO service of process provision in an effort to create jurisdiction in Georgia over all of the Respondents.

The Bank and Mr. Moore are also not subject to service of process under Georgia's long-arm statute. Since this is not a divorce action and since neither Mr. Moore nor the Bank owns, uses or possesses real property in Georgia, the applicable provisions of Georgia's long-arm statute are as follows:

> A court of this State may exercise personal jurisdiction over any non-resident . . . as to a cause of action arising from any of the acts, omissions . . . enumerated in this Code, in the same manner as if he were a resident of this State, if in person or through an agent, he:
>
> (1) transacts any business within the State;
>
> (2) commits a tortious act or omission within the State, . . .
>
> (3) commits a tortious injury in this State caused by an act or omission outside the State if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.

O.C.G.A. §§ 9-10-91(1), (2), and (3).

Neither the Bank nor Mr. Moore has transacted business in Georgia for two reasons. First, O.C.G.A. § 9-10-91(1) only applies to claims based on contract. *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 848 (11th Cir. 1988), *cert. denied*, 494 U.S. 1081 (1990). Second, a non-resident has transacted business in Georgia if he or she "has purposefully done some act or consummated some transaction in the state, if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice." *Davis Metals, Inc. v. Allen*, 230 Ga. 623, 625, 198 S.E.2d 285 (1973). Further, "[m]ere telephone or mail contact with an out-of-state defendant, or even a defendant's

visit to this state are insufficient to establish the purposeful activity with Georgia required by the 'long-arm' statute." *Commercial Foods Specialties, Inc. v. Quality Food Equip. Co.*, 176 Ga. App. 892, 892, 338 S.E.2d 865 (1985). Again, since neither Mr. Moore nor the Bank has done anything in Georgia in connection with the Petitioners' claims other than mailing two form letters and one foreclosure notice letter into Georgia, they have not "transacted business" within the meaning of Georgia's long-arm statute.

Second, neither Mr. Moore nor the Bank has committed a tortious act or omission in Georgia. Again, the only action either Mr. Moore or the Bank took with respect to the State of Georgia was mailing three letters into the State of Georgia. As such, they clearly did not commit any such tort in the State of Georgia.

According to the Petitioners' Complaint, some of the Respondents allegedly breached fiduciary duties allegedly owed to the Petitioners by: (a) advertising the Property for sale in Virginia with clouded title; (b) advertising the sale of the Property only twice in Virginia; (c) conducting the sale in Virginia on December 4, 1991 between Thanksgiving and Christmas; (d) selling the Property at foreclosure when the only bidder was the Bank and one other unrelated third party; and (e) selling some of the Property to the Bank of Floyd at the foreclosure sale in Virginia. All of these activities took place in Virginia, and no such actions took place in Georgia.

Accordingly, neither Mr. Moore nor the Bank committed the torts of breach of fiduciary duty or conspiracy to breach fiduciary duties in the State of Georgia.

Finally, neither Mr. Moore nor the Bank committed a tortious injury in Georgia caused by an act or omission outside of Georgia. In order for this section of the long-arm statute to confer jurisdiction over a non-resident defendant, the Petitioners must show that the non-resident "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in" Georgia. O.C.G.A. § 9-10-91(3). Neither Mr. Moore nor the Bank has engaged in any such activity in Georgia.

Neither Mr. Moore nor the Bank "regularly does or solicits business" in Georgia. The Bank has no office in Georgia, is not licensed to transact business in Georgia, does not advertise in Georgia, and its President is aware of no Bank customers who reside in Georgia. Neither Mr. Moore nor the Bank derive substantial revenue from goods used or consumed or services rendered in Georgia. In fact, Mr. Moore derives no revenue from Georgia, and the Bank, with no offices or branches in Georgia and not being licensed in Georgia, would only derive revenue from services rendered in Georgia to the extent any of its customers have relocated to Georgia with outstanding loans to the Bank. Mr. Moore has testified that he is aware of no such customers. Accordingly, neither Mr. Moore nor the Bank are subject to Georgia's jurisdiction pursuant to Georgia's long-arm statute. As such, the District Court correctly dismissed the Petitioners' Complaint against Mr. Moore and the Bank for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), and the Eleventh Circuit correctly affirmed that decision.

CONCLUSION

For the reasons set forth herein, Respondents Bank of Floyd and Ronald Leon Moore request that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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